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April 6, 1994

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**APR 6 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Opposition to Motion for Leave to Amend" filed by Shellee F. Davis on March 28, 1994.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

  
Stephen T. Yelverton

Enclosure

B:CATON.133

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: The Review Board

OPPOSITION TO MOTION FOR  
LEAVE TO AMEND

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: \_\_\_\_\_  
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Washington, D.C. 20005  
Telephone: (202) 659-3900

April 6, 1994

B:CATON.133

### OPPOSITION TO MOTION FOR LEAVE TO AMEND

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this "Opposition to Motion for Leave to Amend." On March 28, 1994, Shellee F. Davis ("Davis") filed a "Motion for Leave to Amend" and related amendment.

ORA requests leave to file this opposition. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because Davis' amendment raises certain basic qualifying and non-integration matters, a response is appropriate. In support of its opposition, ORA offers the following comments.

In her motion for leave to amend, Davis seeks to amend her application to report that her proposed tower site has been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Davis further represents that she has received "reasonable assurance" of the availability of the tower site from the new owner.

ORA opposes acceptance of the amendment until Davis supplies additional information about the sale of her proposed tower site. Davis fails to disclose when the tower site was sold. Although Davis attached a copy of a letter, dated March 2, 1994, from Mid-Ohio, indicating that the tower site had been sold, the letter does not state when the site was sold. Moreover, Davis fails to state when she first became aware that the tower site had been sold.

Such information is necessary to determine whether Davis timely reported the loss of her tower site within thirty (30) days, pursuant to Section 1.65, and whether she has acted with "due diligence" in obtaining "reasonable assurance" from the new owner. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982).

Davis further fails to provide a copy of her written agreement with the new tower site owner (if one exists), or a written summary of an oral agreement. Review of the tower site agreement would be necessary to determine whether her

technical proposal has changed in any way, such as a change in the transmitter height, in order to accommodate use of the tower by the new owner. A change in Davis' technical proposal could raise basic qualifying issues, or signal coverage issues.

Review of the new tower site agreement would also be necessary to determine whether Davis' cost estimates are now inadequate because of an increase in the lease payments by the new owner. If Davis' lease payments have increased beyond her stated availability of funds, then financial qualifications issues would be raised.

Under established Commission precedent, a post-designation amendment can not be accepted if acceptance would require the specification of new issues, require additional hearings, or allow the petitioner to gain a comparative signal coverage advantage. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970). Davis has simply failed to provide sufficient information about the sale of her proposed tower site and the obtaining of a new tower site agreement in order for the Commission to make an informed judgment as to whether additional issues or hearings would be required by acceptance of her amendment.

The amendment of Davis must not be accepted on another basis. The March 2, 1994, letter submitted with the amendment indicates that Davis never had "reasonable assurance" from Mid-Ohio of her proposed tower site. The letter states in pertinent part that Mid-Ohio had only been "willing to negotiate" with Davis a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, para. 9. More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its

application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd. 1989). Accordingly, unless Davis demonstrates that she had "reasonable assurance" of her proposed tower site at the time of initially filing her application, the amendment must not be accepted.

WHEREFORE, in view of the foregoing, the Review Board is requested to not accept the amendment of Davis.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By   
Stephen W. Yelverton

April 6, 1994

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**Fry & Waller Co., L.P.A.**

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DAVID M. BUDA

March 2, 1994

Ms. Shellee F. Davis  
Britt Business Systems, Inc.  
415 E. Broad St., Suite 100  
Columbus, OH 43215


RE: Mid-Ohio Communications, Inc. / WBBY-FM / Lease of Assets

Dear Ms. Davis:

This correspondence is to advise you that all of the real estate and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which was utilized in regard to the broadcast operation of WBBY-FM has been sold to Spirit Communications, Inc. As you are aware, it has been over two years since the previous owner advised you that if you were awarded the construction permit for the frequency that the previous owner would be willing to negotiate with you regarding the possible lease of the real estate and/or personal property previously involved with the operation of the station. The previous owner has never been advised by you or anyone that a new constructive permit has been issued in regard to the frequency, and the real estate and personal property has now been sold. I am unaware of the new owner's intent in regard to the real estate or the personal property and if you wish to discuss the matter with the new owner, please contact Mr. John Shumate, Spirit Communications, Inc., 114 Dorchester Square, Westerville, Ohio 43081.

Since the real estate and personal property are no longer available for lease by Mid-Ohio Communications, Inc., or affiliated companies, you need to make appropriate arrangements as you deem necessary or as may be legally required in regard to your Application filed with the FCC. If you have any questions regarding this correspondence, please feel free to contact me.

Sincerely,

  
CARL B. FRY

/lt

**CERTIFICATE OF SERVICE**

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 6th day of April, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Motion for Leave to Amend" to the following:

Joseph A. Marino, Chairman\*  
Review Board  
Federal Communications Commission  
Room 211  
2000 L Street, N.W.  
Washington, D.C. 20554

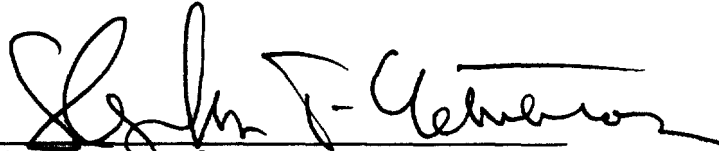
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Stephen T. Yelverton

\*Hand Delivery